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NOT TO BE PUBLISHED IN OFFICIAL REPORTS

IN THE COURT OF APPEAL OF THE STATE OF CALIFORNIA

FOURTH APPELLATE DISTRICT

DIVISION THREE

M.F. MISSION VIEJO, LLC, Plaintiff and Respondent, v. MISSION FOOTHILL ASSOCIATES, LP et al., Defendants and Appellants.	G040545 (Super. Ct. No. 07CC10055) O P I N I O N

Appeal from an order of the Superior Court of Orange County, David T. McEachen, Judge. Affirmed.

Manatt, Phelps & Phillips, Harvey L. Rochman, Becky S. Walker and Craig S. Rutenberg for Defendants and Appellants.

Law Offices of Philipson & Simon, Jeffrey S. Simon and David A. Simon for Plaintiff and Respondent.

* * *

Defendants Mission Foothill Associates, LP and Decron Properties Corporation appeal from an order denying their motion to strike the complaint of plaintiff M.F. Mission Viejo, LLC under Code of Civil Procedure section 425.16 (anti-SLAPP motion; all further statutory references are to this code). They contend the court erred when it concluded the complaint did not arise out of protected activity. We disagree and affirm.

FACTS

According to the allegations of the operative complaint, plaintiff and defendants own separate parcels in a shopping center in Mission Viejo that was originally zoned commercial. The shopping center is subject to a Declaration of Restrictions and Reciprocal Easements (CC&R's) restricting its use to retail and commercial. Defendants own over 75 percent of the shopping center, giving them control over amendments to the CC&R's. When the City of Mission Viejo held hearings on the question of whether the shopping center should be rezoned to include residential in addition to commercial use, the president and general manager of defendant Decron both spoke in favor.

After the city rezoned to allow residential use, plaintiff asked defendants to amend the CC&R's or grant a variance to allow for residential development. Defendants refused. Plaintiff then sued defendants in four causes of action for declaratory relief and for breach of contract, the covenant of good faith and fair dealing, and fiduciary duty.

Plaintiff alleged that, based on changed conditions, the CC&R's prohibiting residential use were "inequitable, unfair, obsolete, unreasonable and contrary to public policy." Defendants had "publicly acknowledged" that the restriction was overridden by the benefit of using land for a residential purpose and was inconsistent with zoning and the public policy of Mission Viejo and California to provide affordable housing.

In the declaratory relief cause of action plaintiff sought a declaration and order that the CC&R's be amended to allow residential use to comply with that public policy. It alleged it had requested an amendment of or variance to the CC&R's for that purpose and that defendants were estopped to take a different position because their representatives, David Nagel and Mark Wiesenthal, had spoken in favor of rezoning at the council meeting. Defendants' refusal was in spite of that public support of rezoning. The breach of contract and breach of the implied covenant of good faith and fair dealing counts made no reference to any statements by defendants to the city council except by virtue of incorporating by reference all prior allegations.

In the breach of fiduciary duty cause of action plaintiff alleged defendants' refusal to amend or grant a variance was arbitrary, unreasonable, and unjustified, for the purpose of forcing plaintiff to sell its parcel in the shopping center to defendants. It quoted the statements made by defendants' representatives at the city council meeting in support of the rezoning. It also pleaded that third parties had offered to buy plaintiff's property contingent upon the amendment and that by refusing to amend defendants were attempting to injure plaintiff. The court sustained a demurrer without leave to amend to this cause of action.

Defendants filed an anti-SLAPP motion arguing that the statements made at the city council meeting were protected activity and that plaintiff could not show the probability it would prevail on the merits at trial. In opposition plaintiff filed, among other documents, a declaration by Raymond A. DeAngelo, the manager of plaintiff's property within the shopping center. He declared that prior to the city council hearings, Nagel had told him he planned to testify at the hearing in favor of the rezoning to residential because defendants believed it was "best" for the shopping center and would benefit all owners. He urged plaintiff, who at that time was undecided, not to oppose rezoning. Once plaintiff asked for a variance or amendment to the CC&R's, however, defendants refused unless plaintiff paid them a "'substantial' amount of money."

DeAngelo also declared that due to changed conditions the restriction against residential use did not benefit the shopping center property, was "inequitable, unfair, obsolete, unreasonable and contrary to public policy," and had "created a conflict and/or hardship . . . ." He reiterated plaintiff's belief that defendants' unwillingness to amend or vary the CC&R's was to force plaintiff to sell its property to them.

One of plaintiff's lawyers also filed a declaration. He quoted the testimony of Nagel and Wiesenthal at the city council meeting that was set out in the complaint. He also attached copies of letters he had written to Wiesenthal and defendants' lawyer. The letters stated various reasons why the CC&R's should be amended or a variance granted, including that residential use would satisfy public policy and failure to amend after rezoning violated the provisions of the CC&R's. Another reason was the testimony of defendants' representatives at the city council meeting.

The court denied the motion, ruling that the statements to the city council were not the gravamen of the complaint and plaintiff did not sue because defendants made such statements.

DISCUSSION

Section 425.16, subdivision (b)(1) provides a party may bring a special motion to strike any "cause of action against a person arising from any act of that person in furtherance of the person's right of petition or free speech under the United States or California Constitution in connection with a public issue . . . ." An "'act in furtherance of a person's right of . . . free speech under the United States or California Constitution in connection with a public issue' includes: (1) any written or oral statement or writing made before a legislative . . . proceeding, or any other official proceeding authorized by law; . . . (4) or any other conduct in furtherance of the exercise of the constitutional right of . . . free speech in connection with a public issue or an issue of public interest."

(§ 425.16, subd. (e).) To prevail on the motion, defendants must show the complaint arises from their exercise of free speech (*Equilon Enterprises v. Consumer Cause, Inc.* (2002) 29 Cal.4th 53, 67), that is, the "act underlying . . . plaintiff's cause of action must *itself* have been an act in furtherance of the right of . . . free speech." (*City of Cotati v. Cashman* (2002) 29 Cal.4th 69, 78.)

Defendants vigorously contend the complaint is based on their statements to the city council and thus the action arises from their free speech. Not so. The complaint is plainly based on the claim they "unreasonably refused" to amend or grant a variance to the CC&R's. This is not protected activity under section 425.16.

Defendants rely heavily on plaintiff's reference to the statements made by Wiesenthal and Nagel to the city council contained in the complaint and evidence submitted in opposition to the motion. But this does not show that the statements are the basis of the action.

As plaintiff contends and despite defendants' arguments to the contrary, the statements are merely evidence supporting plaintiff's action. In *Gallimore v. State Farm Fire & Casualty Ins. Co.* (2002) 102 Cal.App.4th 1388, the plaintiff sued for alleged mishandling of claims by the defendant. In its anti-SLAPP motion the defendant argued the complaint was based on protected statements it made to the Department of Insurance. It contended that allowing the plaintiff to rely on the statements "would effectively interfere with State Farm's right to freely communicate with its regulatory agency." (*Id.* at p. 1399.) In reversing an order granting the motion the court concluded that the defendant was confusing the "allegedly *wrongful acts* with the *evidence* that plaintiff will need to prove such misconduct"; the plaintiff did not sue for the "communicative acts, but rather for its alleged mistreatment of policyholders and its related violations and evasions of statutory and regulatory mandates." (*Ibid.*) Similarly, here the alleged wrongful act is the failure to amend or modify the CC&R's.

Moreover, the statements are not the only reason plaintiff cites for defendants' alleged wrongdoing. Plaintiff also pleads that the limitation on residential use is outdated and conflicts with the public policy of providing low income housing. Additionally it alleges defendants are refusing to amend to induce plaintiff to sell the property to defendants or to obtain a "'substantial'" sum of money from plaintiff. These are independent of any statements by defendants. Plaintiff's allegations show it did not file suit only "*because*" defendants spoke in favor of rezoning. Further, nowhere does plaintiff allege the statements alone are or suffice as the basis of the complaint. The refusal to amend is the alleged wrong, whether or not the statements were made to the council.

Likewise we reject defendants' arguments the statements are "'inextricably intertwined'" with the alleged refusal to amend or vary the CC&R's and that the statements to the city council are part and parcel of the alleged wrongful conduct, not collateral or incidental to it. Defendants' alleged failure to amend or modify the CC&R's is the gravamen, whether or not it made statements to the city council. And the fact that plaintiff pleaded the statements were made, as defendants emphasize, does not change the analysis.

Thus, this is not a "'mixed'" cause of action, i.e., a claim containing allegations of protected and unprotected activity. (*Peregrine Funding, Inc. v. Sheppard Mullin Richter & Hampton LLP* (2005) 133 Cal.App.4th 658, 672.) In those instances anti-SLAPP protection applies "'unless the protected conduct is "merely incidental" to the unprotected conduct.' [Citations.]" (*Ibid.*) But here the alleged protected conduct, i.e., the speech, is not the basis for the complaint at all. Plaintiff does not claim defendants committed any wrongdoing by making the statements to the city council.

Because defendants did not show the complaint arises from their exercise of free speech, they did not shift the burden to plaintiff to demonstrate the probability of

prevailing on the merits (*City of Cotati v. Cashman, supra,* 29 Cal.4th at pp. 80-81) and we need not consider arguments addressing that issue.

DISPOSITION

The order is affirmed. Respondent is awarded costs on appeal.

RYLAARSDAM, ACTING P. J.

WE CONCUR:

BEDSWORTH, J.

ARONSON, J.